CORPORATION COURT FOR CITY OF RADFORD.

STONE-HULING LUMBER CO. *v.* J. C. CURTIS.

1. Courts—Jurisdiction.—Courts ought to be zealous as well as jealous of their jurisdiction when they have it, and likewise they ought to avoid a jurisdiction they have not.

2. Process—Service—Power of Legislature.—The legislature controls absolutely the manner of serving process emanating from the courts and of notice out of court.

3. Motion under § 3211—Service of Notice Out of County.—The plaintiff proceeded by notice and motion under § 3211, in the Corporation Court of the City of Radford, which had jurisdiction under § 3215, because the cause of action arose there. The notice was served on the defendant in the county of Warwick by the sheriff of such county. Held that the notice was properly served, and that § 3220, which provides that process from any court may be directed to the sheriff of any county, except that process against a defendant in an action brought under § 3215 shall not be directed to an officer of any other county than that wherein the action is brought, does not apply.

4. Same—When Notice is Process.—While notice serves the double purpose of declaration and process, it is not held to be process, except and until the same has been duly served and returned to, and filed in, the clerk's office within the five-day period prescribed.

Upon a notice of a motion for a judgment for money.

OPINION.

GARDNER, JUDGE: Under section 3211, as amended by Acts 1914, p. 28, the Stone-Huling Lumber Company notified J. C. Curtis that on the 12th day of May, 1915, it would move the said Corporation Court for judgment for $750.10, balance due it as per itemized account accompanying the notice and supported by the affidavit required in that Section.

This notice is directed to J. C. Curtis, is in the usual form and was by the sheriff of Warwick County, Virginia,—on being required so to do,—regularly served on said J. C. Curtis in said county of Warwick on the 19th day of April, 1915, and duly returned to the Clerk's Office of this Court April 23rd, 1915.

The material facts, agreed in writing, are:—

(1) The cause of action arose in the City of Radford;

(2) The said J. C. Curtis never resided in the City of Radford, but lived in said County of Warwick;

Briefs are filed by both plaintiff and defendant. They practically concede this court's jurisdiction under Section 3215 of the Code.

Defendant, however, moves the court to quash the notice and dismiss the same because of the improper service thereof, and in this regard insists that this notice is governed and restricted by the provisions of Section 3220 and therefore can not be served upon the defendant elsewhere than where the motion is to be made: Hence, this court acquired no jurisdiction over the said J. C. Curtis, personally.

Defendant's contention is that the amendment of 1914 was simply intended to place motions on the same footing as an action at law, and directs his argument to the legislative *intent.*

This is a jurisdictional question, pure and simple.

It may be said that Courts are, and of right ought to be, zealous as well as jealous of their jurisdiction when they have it; and likewise, avoid a jurisdiction they have not.

Section 3215 in express terms gives the right, the jurisdiction, to bring an action where "the cause of action arose." The bringing of an action is the issuance of a proper writ.

"Writs shall run in the name of the 'Commonwealth of Virginia' and be attested by the clerks of the several courts"—Virginia Constitution, Section 106; also, Virginia Code, Section 3223.

That the Virginia legislature controls, absolutely, the manner of serving process emanating from the Courts and the mode of serving notices *out of Court,* is clear.

That the legislature may restrict as well as prescribe the manner and mode of service, is equally clear.

Said Section 3220 provides:

"Process from any Court may be directed to the Sheriff of any County except that process against a defendant in an action brought under Section 3215 shall not be directed to an officer of any other County than that wherein the action is brought, unless it be against a railroad, express, canal, navigation, turnpike, telegraph or telephone company, or upon a bond taken by an officer under authority of some statute, or to recover damages for a wrong, or against two or more defendants on one of whom such process has been executed in the county or corporation in which the action is brought."

That Section further requires such process to be returned "within 90 days after its date," with the single exception that a summons for a witness may be returnable on whatever day his attendance is required.

Clearly, Section 3220 does not necessarily include, or apply to, a notice which must be specifically directed to the party sought to be brought into the jurisdiction—the *situs* of which has already been fixed by statute. Section 3215.

Under Section 3207 a notice must be served as there prescribed; and any officer on being required to serve such notice

must do so, within his County or corporation, under the penalty therein declared.

Is it to be said that the Sheriff of Warwick County could have legally refused to serve this notice? Surely not!

In this case the notice has been served in strict compliance with all the requirements of the Statute.

In 'Iolanthe' the Lord Chancellor avouches it as the law of fairy-land that any fairy marrying a mortal "shalt surely die." It is without the province of mortals or fairies to so amend such law as to read, 'shalt *not* surely die.' And so, it is not within the power of this Court to deny, or restrict, plaintiff in its absolute right to have its notice served "in the mode" prescribed by law; that is, "by serving a copy thereof in writing on the party in person." Section 3207.

Numerous instances appear wherein a Court obtains jurisdiction solely because the transaction occurred there and the defendant, or defendants, may be ruthlessly summoned into such jurisdiction,—Sec. 3214. Indeed, this seems to be generally and distinctly the legislative policy; otherwise, is the exception,—*vide* Section 2259, 2961-65; also, Sections 3209-10, 3214, 3218, 3436, et als. As to distinction throughout between process and notice see Sections 3225-6-7-8 and 3436 &c.

True, the Supreme Court of Appeals has held that the notice serves the double purpose of declaration and process and is to that extent "process." But, a notice is not so held to be "process" except and until the same has been duly served and returned to, and filed in, the Clerk's Office within the five-day period prescribed.

It is then, and not till then, considered and treated as both a declaration and process for the purpose of proceeding by the ancillary process of attachment, or other proper procedure.

Section 3211 restricts the service of notice there provided for, only in the particulars that the same must be served fifteen days before the motion can be made, and be returned to the Clerk's Office within five days after such service. Hanks *v.* Lyons, 92 Va. 30.

That Section now provides in part:

"Any person entitled to recover money, damages or a penalty in an action at law may, on motion before any court which would have jurisdiction of such action, obtain judgment for such money, damages or penalty after fifteen days notice &c." Acts 1914, p. 28.

Previous to the 1914 amendment, Section 3211, in its several enactments, seems to have been studiously excluded from the operation of Section 3215 and all benefits thereunder.

The distinguished diplomat Tellyrande, long since hath said

that language was given us in which to couch, or conceal, our real intentions.

Professor Minor suavely refers to our law-makers as, "Lawyers and demi-lawyers:" yet, that same can not be imputed to the Virginia Legislature of 1914 merely because it could have restricted, in the particular here considered, service of the notice under Section 3211, but did not.

The Court is of opinion that this notice has been properly served and that this Court has complete jurisdiction to hear and determine the motion.

Note.

As stated in an editorial in the October issue of the Law Register, vol. 1 (N. S.) 462: "There is no reason whatever that this jurisdictional difference should exist between a proceeding by notice and motion and a common law action, and our next General Assembly should make the two remedies conform in this respect." The simplest way to make the jurisdiction the same in the two proceedings is by amending § 3220.

It was at first intended to annotate this case at some length, giving the opposite side of the question from that stated by Judge Gardner, but a careful reading of § 3220 is convincing that Judge Gardner is clearly correct. There are any number of cases from other states which hold that "process" includes "notice." In this state, however, by § 3223 of the Code "process" is defined "to be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action." The provisions in § 3220, subsequent to the provision restricting the direction of process to an officer of the county wherein the action is brought, which provide for issuance, execution and return of process, undoubtedly mean process as defined in § 3223.